

# Legal Assistance Resource Center

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### H.B. 5049 -- Regulation-writing procedure

GAE Committee public hearing – March 3, 2014

Testimony of Raphael L. Podolsky

<b>Recommended Committee action: REVISIONS REQUESTED</b>
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H.B. 5049 attempts to accelerate the procedure for the adoption of regulations in a variety of ways. We agree that the regulation-writing process sometimes takes longer than it should. We are concerned, however, that some of the changes contained in this bill will adversely impact both the ability of the public to have input and the review provided by the Attorney General and the legislature's Regulation Review Committee. As a result, we think that significant changes to the bill should be made before it is adopted.

Our primary comments are about the new, broad proposal for "noncontroversial" regulations found in C.G.S. 4-168(h) [lines 278-309], which replaces the narrower provisions for "emergency regulations" in C.G.S. 4-168(g) [lines 256-177]. We also have a number of smaller, more specific concerns about other sections of the bill.

A. "Noncontroversial" regulations [lines 278-309]:

H.B. 5049 allows regulations to avoid significant portions of the regulation review process if the agency asserts that the regulation "is expected to be noncontroversial." In such a case, the regulation will become law in 30 days, without review by the Attorney General or the Regulation Review Committee, unless an "objection" is received within those 30 days from at least 15 people, from an organization representing at least 15 people, or from a member of the General Assembly. In effect, the mere absence of a response makes the regulation automatically effective, without opportunity for further consideration.

- The bill does not adequately measure "noncontroversial": The bill treats as "noncontroversial" – and thus subject to only limited review – proposed regulations which may in fact be controversial or, at the least, need modification. The bill's quasi-definition, which effectively shifts onto the public the burden to get full review of a proposed regulation, is not an adequate way to identify which proposals do or do not need further review. First, a noncontroversial regulation is, presumably, one about which there is no controversy. If the goal is to distinguish regulations with known objection from those without, then an objection from one person should be enough to remove a proposal from the "noncontroversial" category. In effect, the bill assumes that all persons who might be interested in the regulation are either organized into groups or have lobbyists. The bill should be adjusted to make any objection sufficient to trigger the normal review process. Second, the short timeline for raising an objection, combined with the automatic nature of adoption after 30 days without Attorney General or Regulation Review Committee review, assumes an efficient level of public monitoring

that does not always exist. Third, there is a danger that some agencies may routinely identify nearly all of their proposed regulations as noncontroversial in the hope that no one will object. There should also be a provision in the bill that explicitly prohibits an agency from proposing a regulation as noncontroversial if it knows that there are any persons or groups that it expects would object to the regulation or to the way in which some part of it is written.

- "Objection" is too narrow a term to justify skipping parts of the regulation review process. Review of a regulation is often about changing it, not necessarily objecting to it. Entities that support the regulation may well want parts of the regulation revised. The reason that the statute gives the public, the Attorney General, and the Regulation Review Committee the opportunity for comment or review is in recognition that an agency, working in-house, will not necessarily come up with all the right answers in writing a regulation. Public input improves regulations and may even result in the voluntary withdrawal of regulations that have not been well thought-through. Any reference in the bill to "objection" should be removed and "comment" substituted, so that a comment does not have to be characterized as an objection to preserve the full review process..
- Certain parts of the regulation-writing process should not be skipped, even if a proposed regulation is without controversy. Attorney General review is necessary to confirm that the proposed regulation is legally authorized. Regulation Review Committee review should not be omitted because that committee functions as the voice of both the general public and the legislature to assure that the regulation is substantively consistent with the statute to which the regulation applies. This is necessary, even if no one from the public submits comment on the regulation or if issues about the regulation are not immediately identified within the initial 30-day period.
- There is already a provision for emergency regulations in the law: The existing statute already makes provision for time-limited emergency regulations when there is need for special speed, but even that provision preserves Attorney General and legislative committee review. There is also special statutory authority for DSS to operate programs while regulations are being written, primarily because of the budget impact of those regulations.
- The major causes of delay are not the structural process for regulation-writing that this section of H.B. 5049 would change but rather the ability of the agency itself to write or revise proposed regulations. This is often the result of budget and staff limitations within the agency, which make quick internal action difficult. The legislature has, in fact, attempted to give agencies a head start on writing regulations. Thus, C.G.S. 4-168(c) allows agencies to begin the regulation process as soon as the public act permitting or requiring regulations is adopted (or even before), without waiting for the effective date of the law, as long as the regulation will not take effect before the effective date of the act.

#### B. Other concerns:

- Role of the Regulation Review Committee (l. 480-492): The bill narrows the options of the Regulation Review Committee in two ways : (1) by repealing the power to approve only a part of a regulation and (2) by repealing the power to approve a regulation subject to technical changes. The purpose of these proposed changes seems to be to restrict the Committee's discretion, but its practical effect will be to force all-or-nothing choices that will unnecessarily lead to rejections of regulations and will further slow the process of getting regulations approved. We support the proposed requirement that technical objections be submitted to the agency at least ten days before the Committee meeting

so as to permit the agency to make corrections itself (l. 473-479), but that provision will not eliminate all circumstances in which an approval with technical corrections would be appropriate and desirable.

- Notice of decision (l. 178-182): The notice of decision on agency action should be sent in paper to any commentator who has requested notification in paper. The bill appears to provide only for electronic notice at that stage of the process.
- Filing objections to noncontroversial regulations with the Secretary of the State (l. 304-309): Under the noncontroversial regulations section of the bill, "objections" are supposed to be filed with the Secretary of the State, not the agency. This seems to be the wrong place, since the objection should be addressed to the agency, so that it can evaluate it.
- Cross-referenced materials (l. 323-325 and l. 593-612): Materials included by reference, in either the review record (l. 323-325) or the regulation itself (l. 593-612) -- such as federal regulations or a code produced by a private entity -- should be made as easily accessible as possible to those who consult the regulations. It is preferable that such materials be included in the regulation itself. If that cannot reasonably be done, then the regulation or public record should contain an electronic link to the referenced material (or an equivalent simple means of viewing the referenced material should be provided).
- LCO report (l. 473-479): The LCO report, to which this section refers, should be available to the public at the same time that it becomes available to the agency.
- Paper copy of the complete Regulations of Connecticut State Agencies (l. 669-672). The bill permits but does not require that there be any hard copies of the regulations. For some people, the unavailability of a hard copy will make research difficult and make the regulations largely inaccessible. Requiring that a hard copy be provided to the Secretary of the State, the State Library, and the state law libraries should at least be considered.
- DCF policies (l. 816-1025): Sections 14 through 20 apparently attempt to insulate certain DCF rules from the regulation review process by labeling them "policies" rather than "regulations." In fact, "policies" are regulations under C.G.S. 4-166(13) and are covered by the statute unless they concern only "the internal management of any agency" and do not affect "private rights or procedures available to the public." Most of the statutes amended in these sections appear to involve private rights or procedures available to the public. It is not clear why they should be adopted, amended, or repealed without the regular comment and review process.
- Repeals of regulations and statutes (l. 1534-1607): Section 33 of this bill repeals many regulations and Section 34 repeals many statutes. We have not been able to get a full picture of the status of these provisions, but we urge the Committee to review them carefully. To the extent that these references are to statutes not currently being implemented, we suggest that the test for repeal should not be merely the absence of present implementation but rather that implementation of the program should not be initiated or resumed.